

No. 78-1607

Supreme Court, U. S.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1978

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MARYLAND LUMBER COMPANY,  
*Petitioner,*

v.

UNITED STATES OF AMERICA, ET AL.,  
*Respondent.*

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ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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**MEMORANDUM IN RESPONSE TO MEMORANDUM  
FOR THE UNITED STATES IN OPPOSITION**

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The Memorandum for the United States in opposition to the Petition for a Writ of Certiorari filed by the Solicitor General of the United States (hereinafter referred to as the "Government's Memorandum") correctly states Petitioner's contention that the District Court erred in denying Petitioner an evidentiary hearing or discovery to explore the question of whether the Internal Revenue Service had made an institutional decision to refer the case to the Department of Justice for prosecution prior to issuance of the summons. In *United States v. LaSalle National Bank*, 437 U.S. 298

(1978), the Supreme Court articulated the principle that once Internal Revenue Service had made such an institutional decision, it would be improper for Internal Revenue Service to issue an administrative summons for the production of documents and records.

The Government's Memorandum first attempts to becloud the issue posed by the Petition for a Writ of Certiorari (hereinafter referred to as the "Petition") by claiming that the Petitioner failed to comply with an earlier summons which the District Court had ordered enforced in *United States v. Maryland Lumber Company*, No. N-76-1664 (D. Md. January 25, 1977). That same assertion was made for the same purpose by the Department of Justice lawyer in oral argument before the United States Court of Appeals for the Fourth Circuit. The fact is that the Petitioner fully complied with the earlier summons to the extent that the summoned documents and records were in its possession or available to it. Generally, a contumacious failure to comply with any Internal Revenue summons will result in a contempt hearing before the District Court, and no such contempt hearing has been requested by the government lawyers. The efforts of the Solicitor General to suggest that the Petition should be denied because the Petitioner did not comply with an earlier summons in the same investigation is factually incorrect and is an unwarranted effort to characterize the Petitioner, and hence its Petition, as unworthy of consideration.

The Government's Memorandum next asserts that the government has made a *prima facie* showing that it is entitled to enforcement of the summons in this case and that such showing shifts to the Petitioner the burden of proving that enforcement would constitute an abuse of the court's process. The fallacy here is the assertion that the government has established its *prima facie* showing which entitles it to enforcement of the

summons. The summons enforcement case which is the subject matter of the Petition was heard by the District Court on August 18, 1977, almost a year before the Supreme Court handed down its decision in the *LaSalle National Bank* case. Thus, the District Court's conclusion that the government had established a *prima facie* case for enforcement of the summons could not have considered the principle enunciated in the *LaSalle* opinion that once Internal Revenue Service had made an institutional decision to refer a case to the Justice Department for prosecution, it was too late for it to issue an administrative summons for the production of documents and records. Moreover, there is absolutely no affidavit or other assertion or evidence of any kind in the record which in any way indicates that Internal Revenue Service had not made an institutional decision to refer the case to the Justice Department for prosecution at the time that it issued the summons in question. Contrary to its own assertion, it is clear that the government has failed to make a *prima facie* case for enforcement of the summons.

Finally, the Government's Memorandum's characterization of the Petitioner's defense to the summons is completely erroneous when it states that such defense is based on the assertion that the summons was issued solely for criminal investigative purposes because the agent had formed a firm purpose to recommend prosecution. The Petitioner is as aware as the government must be that the existence or nonexistence of a valid civil tax determination or collection purpose by Internal Revenue Service is totally irrelevant to the enforceability of a summons issued after Internal Revenue Service has made an institutional decision to refer the matter to the Justice Department for prosecution. As clearly stated in the Petition, and as reiterated herein, the Petitioner's defense to the summons is based upon the fact that there is nothing in the record concerning whether or not Internal Revenue Service

had, at the time that the summons was issued, made an institutional decision to refer the matter to the Justice Department for prosecution, that the Petitioner was denied any means of testing the existence or nonexistence of such an institutional decision and that such denial made it impossible for the Petitioner to carry its burden of proof in resisting the summons. Because the summons in this case was issued 8½ months later than the prior summons for which the Petitioner was allowed an evidentiary hearing, and because, as asserted in the Petition, the validity of an administrative summons must be tested at the time of its issuance, the Petitioner was denied the only legal means for obtaining the facts which it could allege or present in an affidavit to resist enforcement of the summons.

It is therefore respectfully submitted that the Government's Memorandum is totally without merit and that the Writ of Certiorari should be granted by the Supreme Court.

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